ABDUL KARIM PAK KUB & ANOR.

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
MAHADEV SHANKAR JCA
ABDUL MALEK AHMAD JCA
[CRIMINAL APPEAL NO: A-05-39-1994]
26 OCTOBER 1996

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking in dangerous drug - Actual trafficking - Whether definition of drug important - Whether to be distinguished from case of possession - Whether reliance on presumptions under s. 37(da) necessary*

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking in dangerous drug - Cannabis - Evidence of chemist - Whether must state cannabis as defined in s. 2 - Whether sufficient to state cannabis as defined in the Act - Whether can be confused with cannabis (Indian hemp)*

The appellants were charged with trafficking in a dangerous drug, to wit, 3,503g of cannabis under the Dangerous Drugs Act 1952 ('the Act'). Without calling for their defence, the High Court acquitted and discharged them on account that: (i) the chemist had merely stated that the substance was cannabis without itemising the actual tests he undertook and without giving reasons for his conclusion; (ii) the chemist had merely stated that the substance was cannabis as defined in the Act without referring to any particular section; and (iii) it was incumbent on the prosecution to lead evidence through the chemist to establish beyond all reasonable doubt that the subject matter of the charge was cannabis as defined in s. 2 of the Act. On appeal by the Public Prosecutor, the Supreme Court remitted the case to the High Court and ordered that the appellants' defence be called. In the result, the High Court held that the appellants had failed to rebut the presumptions under ss. 37(d) and 37(da)(vi) of the Act, and, thus, convicted and sentenced them to death.

The appellants appealed to the instant Court. Counsel for the appellants argued that since the chemist did not specifically state that the substance was cannabis as defined in s. 2 of the Act, the substance could very well have been cannabis (Indian hemp) as listed in Part III of the First Schedule of the Act. Thus, Counsel submitted that there was doubt as to what the substance analysed by the chemist was, and urged the Court to substitute the conviction for one under s. 12(2) of the Act on the authority of *Shukri Mohamad v. PP*.

Held:

Per Shaik Daud Ismail JCA:

[1] As long as there is evidence by a chemist that an exhibit examined and analysed is cannabis as defined in the Act, it is **not** necessary to allude to any particular section of the Act. Cannabis is defined only in s. 2 of the Act whereas cannabis (Indian hemp) is nowhere defined in the Act. Therefore, when the chemist stated that the substance was cannabis as defined in the Act, it **could only mean** that it was cannabis as defined in s. 2 of the Act.

[2] The definition of the drug in *Shukri Mohamad v. PP* became very important as the Court in that case was concerned with the presumptions under s. 37(da) of the Act. The instant case, however, was distinguishable, as it was not a case of possession but of actual **trafficking** and, consequently, reliance on s. 37(da) of the Act was **not** necessary.

[3] Once trafficking is proved, there is **no** necessity to invoke the presumptions under s. 37(da) of the Act. The said presumptions need only be invoked when there is no evidence of actual trafficking and the prosecution is relying solely on evidence of possession, custody or control.

[4] In the light of the definition of trafficking under the Act, it appears, in theory, that where there is evidence of actual trafficking, even in one gram of any dangerous drug, whether as defined in s. 2 of the Act or as listed in the Schedules, it is trafficking under the Act.

[5] Although the substance in the instant case might well have been cannabis (Indian hemp), the appellants were rightly convicted of trafficking under s. 39B(1)(a) of the Act as there was overwhelming and uncontroverted evidence of actual trafficking against them.

Per curiam:

[1] If the appellants had been found to be merely in possession, custody or control of the substance, which turned out to be cannabis (Indian hemp), then the presumptions under s. 37(da) of the Act would **not** have been invocable against them.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

UNDANG-UNDANG JENAYAH: *Akta Dadah Berbahaya 1952, s. 39B(1)(a) - Mengedar dadah berbahaya - Pengedaran sebenarnya - Samada definasi dadah penting - Samada harus diperbezakan daripada kes pemilikan - Samada pergantungan ke atas tanggapan di bawah s. 37 (da) perlu*

UNDANG-UNDANG JENAYAH: *Akta Dadah Berbahaya 1952, s. 39B(1)(a) - Mengedar dadah berbahaya - Kanabis - Keterangan Ahli Kimia - Samada mesti menyatakan kanabis sepertimana yang ditakrifkan dalam s. 2 - Samada memadai untuk menyatakan kanabis sepertimana yang ditakrifkan dalam Akta - Samada boleh dikelirukan dengan kanabis (Indian hemp)*

Perayu-perayu telah dituduh mengedar dadah berbahaya, iaitu 3,503g kanabis di bawah Akta Dadah Berbahaya 1952 ('Akta'). Tanpa memanggil pembelaan mereka, Mahkamah Tinggi telah membebaskan dan melepaskan mereka atas alasan bahawa: (1) ahli kimia telah hanya menyatakan bahawa bahan tersebut adalah kanabis tanpa menyenaraikan ujian-ujian sebenar yang telah beliau jalankan dan tanpa memberikan alasan-alasan bagi kesimpulan beliau; (ii) ahli kimia telah hanya menyatakan bahawa bahan tersebut adalah kanabis sepertimana yang ditakrifkan dalam Akta tanpa merujuk kepada mana-mana seksyen yang khusus; dan (iii) ianya adalah wajib bagi pihak pendakwaan untuk mengemukakan keterangan melalui ahli kimia untuk menentukan tanpa ragu-ragu bahawa hal-perkara pertuduhan tersebut adalah kanabis sepertimana yang ditakrifkan dalam s. 2 Akta. Atas rayuan oleh Pendakwa Raya, Mahkamah Agung telah mengemukakan semula kes itu kepada Mahkamah Tinggi dan memerintahkan supaya pembelaan pihak perayu dipanggil. Hasilnya, Mahkamah Tinggi telah memutuskan bahawa perayu-perayu telah gagal untuk mematahkan tanggapan di bawah s. 37(d) dan 37(da)(iv) Akta, dan dengan itu, mereka telah disabitkan dan dihukum mati.

Perayu-perayu telah merayu kepada Mahkamah semasa. Peguam bagi pihak perayu-perayu telah berhujah bahawa oleh kerana ahli kimia tidak secara khususnya menyatakan bahawa bahan tersebut adalah kanabis sepertimana yang ditakrifkan dalam s. 2 Akta, maka bahan tersebut kemungkinannya adalah kanabis (Indian hemp) sepertimana yang disenaraikan dalam Bahagian III Jadual Pertama Akta. Dengan itu, Peguam berhujah bahawa terdapat keraguan mengenai apakah bahan yang telah dianalisakan oleh ahli kimia itu, dan menggesa Mahkamah untuk menggantikan sabitan tersebut dengan satu sabitan di bawah s. 12 (2) Akta atas autoriti *Shukri Mohamed lwn PP*.

Diputuskan:
Oleh Shaik Daud Ismail HMR:

[1] Asalkan terdapat keterangan oleh seorang ahli kimia bahawa sesuatu eksibit yang diperiksanya dan dianalisakan adalah kanabis sepertimana yang ditakrifkan dalam Akta, ianya adalah **tidak perlu** untuk merujuk kepada mana-mana seksyen yang khusus dari Akta. Kanabis hanya ditakrifkan dalam s. 2 Akta sedangkan kanabis (Indian hemp) tidak ditakrifkan di mana-mana dalam Akta tersebut. Dengan itu, apabila ahli kimia menyatakan bahawa bahan tersebut adalah kanabis sepertimana yang ditakrifkan dalam Akta, ianya **hanya bermaksud** bahawa ianya adalah kanabis sepertimana yang ditakrifkan dalam s. 2 Akta tersebut.

[2] Definasi dadah dalam *Shukri Mohamed lwn. PP* menjadi amat penting kerana Mahkamah dalam kes itu membuat perhitungan tentang tanggapan di bawah s. 37(da) Akta. Kes semasa ini, walaubagaimanapun, boleh diperbezakan, kerana ianya bukan merupakan kes pemilikan tetapi mengenai **pengedaran** sebenarnya dan, akibatnya, pergantungan ke atas s 37(da) Akta adalah **tidak** perlu.

[3] Sebaik sahaja pengedaran dibuktikan, adalah **tidak** perlu untuk menggunakan tanggapan di bawah s. 37(da) Akta. Tanggapan-tanggapan tersebut hanya perlu digunakan apabila tidak terdapat keterangan pengedaran yang sebenarnya dan pihak pendakwaan bergantung semata-mata atas keterangan pemilikan, penjagaan atau kawalan.

[4] Mengambil kira definasi pengedaran di bawah Akta, adalah kelihatan, menurut teori, bahawa di mana terdapatnya keterangan pengedaran yang sebenarnya, walaupun seberat satu gram sekali pun dari mana-mana dadah berbahaya, sama ada sepertimana yang ditakrifkan dalam s. 2 Akta atau sepertimana yang disenaraikan dalam Jadual, ianya adalah pengedaran di bawah Akta.

[5] Walapun bahan dalam kes semasa ini berkemungkinan adalah kanabis (Indian hemp), perayu-perayu telah secara betulnya disabitkan atas mengedar di bawah s 39B(1)(a) Akta kerana terdapatnya keterangan yang amat jelas dan tidak dapat dipertikaikan mengenai pengedaran sebenarnya terhadap mereka.

Per Curiam:

[1] Jika perayu-perayu telah didapati hanya memiliki, menjaga atau mengawal bahan tersebut, yang mana di dapati adalah kanabis (Indian hemp), maka tanggapan di bawah s. 37(da) Akta tidak akan dapat digunakan terhadap mereka.

[Rayuan ditolak.]

Cases referred to:
Shukri bin Mohamad v. PP [1995] 3 CLJ 799 ***(dist)***
Abdullah b. Yaacob v. PP [1991] 2 MLJ 237 ***(refd)***

Legislation considered:
Dangerous Drugs Act 1952, ss. 2, 1(a), 12(2), (3), 37(d), da, da(iv), 39B(1)(a), 40A

For the appellant - Karpal Singh; M/s. Karpal Singh & Co.
For the prosecution - Azahar Mohamed, Deputy Public Prosecutor

JUDGMENT

Shaik Daud Ismail JCA:

Both the appellants were convicted by the Taiping High Court of trafficking in dangerous drugs to wit 3,503 gms of cannabis on 25 May 1992 at about 3.20 p.m. at Batu 108 Air Krai, Kerunai, Gerik, Perak and accordingly sentenced to death.

Originally they were acquitted and discharged by the same Court without their defence being called when the Court held that there was a doubt on what the substance found on them was. This was because the chemist when giving evidence said that the substance he analysed was "cannabis" as defined in the Dangerous Drugs Act 1952. Firstly the Court held that the chemist in testifying that the substance was cannabis, which evidence was unsupported by other credible evidence, had failed to state how he arrived at that conclusion. In other words the Court was of the view that the chemist merely said that the substance was cannabis without giving any reasons therefor and without itemising the actual tests undertaken by him. Secondly the Court held that the chemist merely said that the subtance was cannabis as defined in the Dangerous Drugs Act 1952, without referring to any particular section. The Court held that it is incumbent on the prosecution to lead evidence through the chemist to establish beyond reasonable doubt that the subject matter of the charge was in fact cannabis within the meaning of s. 2 of the Dangerous Drugs Act 1952.

The Public Prosecutor not being satisfied with the acquittal appealed to the then Supreme Court. After hearing arguments, the Supreme Court had remitted the case back to the High Court and had ordered that the defence be called. This could only mean that the Supreme Court had rejected the High Court's finding on this issue. The High Court as directed heard the defence and came to the conclusion that the defence being a mere denial had failed to rebut the presumption under s. 37(d) and 37(da)(vi) of the Dangerous Drugs Act 1952 and accordingly convicted both the appellants.

Although several grounds were put forward in this appeal, Karpal Singh appearing for both the appellants relied and argued only on one ground i.e. that there is doubt as to what the substance analysed by the chemist was. This is because the chemist merely said that he found the substance to be cannabis as defined under the Dangerous Drugs Act 1952. He submitted that since the chemist did not specifically mention that the cannabis was as defined in s. 2 of the Act, it could well be cannabis (Indian Hemp) as listed in Part III of the First Schedule to the Act. In support of his submission he cited a recent decision of the Federal Court which was delivered on 9 October 1995. It is the decision in *Shukri bin Mohamad v. PP* [1995] 3 CLJ 799; CLJ (JT) No. 27/95; [1995] 3 AMR 46: 2695. Based on this decision, he had urged this Court to substitute the conviction for one under s. 12(2) of the Act, as was done in *Shukri's* case.

In *Shukri's* case the appellant was similarly convicted for an offence under s. 39B(1)(a) Dangerous Drugs Act 1952 for trafficking in 36 kilograms of cannabis and was sentenced to death. The facts show that during the trial, as in this case, the chemist had described the drugs, as "Cannabis as defined in the DDA 1952" and not "Cannabis as defined in s. 2(1) thereof." The Federal Court held at p. 799:

> (1) The glaring omission by the chemist to refer to s. 2(1) of the Act could give rise to the inference that they did not have in mind the ingredients of cannabis as defined therein. His testimony is thus open to the construction that the plant material examined by him was either "Cannabis" within the meaning of s. 2(1) of the Act or that it was "Cannabis (Indian Hemp)" listed in Part III of the First Schedule of the Act, **though nowhere defined in the Act**. (Emphasis is mine).

The Federal Court also came to the conclusion that in the context of the relevant legislation, being found in possession, custody or control of "Cannabis (Indian Hemp)", without the necessary authorisation, is an offence under s. 12(2) of the Act punishable under s. 12(3) thereof. The Court held further that it follows that "Cannabis" and "Cannabis (Indian Hemp)" even though of the same weight, may not be the same thing, as they may constitute the subject matter of different offences which may be differently penalised, and it follows that the **presumption under s. 37(da) cannot arise in that case.** (Emphasis is mine).

The Federal Court then allowed the appeal, quashed the conviction and sentence and substituted it with a conviction under s. 12(2) of the Act and sentenced the appellant to five years imprisonment.

The learned Deputy Public Prosecutor Azahar b. Mohamed (who incidentally also appeared for the Public Prosecutor in *Shukri's* case) while conceding that the nature of the evidence in the present appeal is similar as in *Shukri's* case urged upon this Court that *Shukri's* case is distinguishable. Before going into this aspect of the DPP's submission, it is, I think, pertinent to also consider another similar case decided by the then Supreme Court which decision, to my mind, is also binding on this Court. In *Abdullah b Yaacob v. PP* [1991] 2 MLJ 237 the appellant was also convicted for trafficking 536 grammes of ganja. One of the issues was whether it is sufficient that the evidence given by the chemist that the substance examined and analysed by him was ganja but did not state that it was ganja as defined in s. 2 of the Dangerous Drugs Act 1952. The Court held (at p. 239) that it is not sufficient for the chemist to say that the substance was ganja but there must be evidence confirming that it is ganja as defined under the DDA 1952. The Court then referred to the chemist report which says that the cannabis was as defined in the Dangerous Drugs (Amendment) Act 1980 without alluding to any particulars. From this the Court came to the conclusion that there were no doubts raised that the exhibit examined and analysed by the chemist was ganja according to the requirement of the 1952 Act. From this it seems clear to us that what the Court is trying to say is that as long as there is evidence by the chemist that the exhibits examined and analysed is ganja as defined in the Act it is sufficient without alluding to any particular section. Therefore when the chemist says the ganja is as defined in the Act this can only mean one thing and that is as defined in s. 2 of the Act. Cannabis is defined only in s. 2 of the Act. We think this is the only sensible construction as Cannabis (Indian Hemp) is nowhere defined in the Act. Therefore when the chemist says the cannabis is as defined in the Act he must have in mind the cannabis as defined in s. 2 of the Act. The fact that cannabis (Indian Hemp) is nowhere defined in the Act is even accepted by the Federal Court in *Shukri's* case. Therefore if cannabis (Indian Hemp) is nowhere defined in the Act and cannabis is defined in s. 2 of the Act, then when the chemist says the substance cannabis is as defined in the Act, it can only mean one thing.

All these differences may not be necessary or relevant if we now consider the learned DPP's submission that *Shukri's* case is distinguishable from the present case on appeal. On a careful reading of the judgment in *Shukri's* case it becomes very obvious that the Court was concerned with the presumption under s. 37(da) of the Act. The facts in *Shukri's* case show that he was held to be in possession of some 36 kgs of cannabis. Therefore the presumption under s. 37(da) arises that "he shall be presumed, until the contrary is proved, to be trafficking in the said drug". Therefore on the facts

of *Shukri's* case the definition of the cannabis becomes a very important issue. It must be determined beyond reasonable doubt what the drug was. If the drug concerned was cannabis as defined in s. 2 of the Act then s. 37(da) applies and he ought to be charged under s. 39B(1)(a) of the Act. On the contrary if the drug found in his possession is not cannabis as defined in s. 2 of the Act then, in the words of the Federal Court in *Shukri's* case, "the presumption under s. 37(da) cannot arise". Bearing this very important distinction in mind, it is submitted by the learned DPP that in the present appeal the prosecution and eventually the Court need not rely on the presumption under s. 37(da) of the Act. This is not a case of mere prossession. He submitted that in lighit of the wide definition of trafficking, the prosecution in the present appeal, had successfully presented actual evidence of trafficking. It has not been challenged that the prosecution had adduced evidence of the agent provocateur, admissible under s. 40A of the Act, of the meeting with the appellants, the negotiations for the sale and purchase of the drug, and finally the actual purchase thereof. All this evidence without doubt establish the act of trafficking. Trafficking is defined under the Act to include buying, selling, giving, receiving, transporting, carrying, sending, delivering, etc. and once that is proved there is no necessity to invoke the aid of the presumption under s. 37(da) of the Act. It cannot be denied that the presumption would only be invoked when there is no evidence whatsoever of actual trafficking and when the prosecution is solely relying on the evidence of possession, custody or control. In the light of the definition of trafficking under the Act it would appear that in theory where there is evidence of actual trafficking even in one gramme of any dangerous drug, whether defined in s. 2 or as listed in the Schedules, is trafficking under s. 2(1)(a) of the Act. Of course in practice it would not be conscionable to charge anyone with trafficking in one gramme of dangerous drug even when there is evidence of actual trafficking. Therefore on the facts of the present case and in the light of the overwhelming evidence of actual trafficking of the dangerous drug even though it may well be cannabis (Indian Hemp) the appellants were rightly convicted of trafficking. If the appellants were found to be merely in possession, custody or control of the drug which if it turns out to be cannabis (Indian Hemp) then it follows that the presumption under s. 37(da) cannot be invoked against them. This is also recognised by the Federal Court in *Shukri's* case. Even if the construction most favourable to the appellants is taken as to the type of drug in this case, i.e. Cannabis (Indian Hemp), in the light of the uncontroverted evidence of actual trafficking, it is our view that they were rightly convicted under s. 39B(1)(a) of the Act. Their defence being merely a total denial found no favour with the learned Judge. Having gone through the defence ourselves we have no hesitation in agreeing with this finding. Giving the case our best consideration we would agree with the submission of the learned DPP that

Shukri's case is distinguishable and therefore has no application in the present case. We would therefore hold that in the circumstances of this case, the conviction of both the appellants was justified and correct and their appeals both against conviction and sentence is accordingly dismissed.

Reported by Gan Peng Chiang